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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 2007

Anis Soenaryo, Ansil Amirudin Gadang, Akhdan Gadang, and Akmal Gadang,
Petitioners,
v.
Michael B. Mukasey U.S. Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 2007

QUESTION PRESENTED

(1) Whether the Fourth Circuit Court of Appeals authority in *Stewart v. INS*, 181 F.3d 587, 595 (4th Cir. 1999), holding that "circuit precedent precludes our consideration of any facts not presented to the BIA for consideration," is in direct conflict with the Second and Ninth Circuits that hold "it is nonsense to suppose that we are so cabined and confined that we cannot exercise the ordinary power of any court to take notice of facts that are beyond dispute" *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004); and "notwithstanding the statutory injunction to 'decide the petition [for review] only on the administrative record on which the order of removal is based, we have previously taken judicial notice of facts outside the record." *Lin v. U.S. Dept.*, 473 F.3d 48, 51 (2nd Cir. 2007) (internal citations omitted).

(2) Whether an alien refugee seeker's procedural due process rights under the Fifth Amendment of the United States Constitution is violated when a circuit court strikes the alien's substantial and material evidence of her prior attorney's involvement with an international asylum fraud ring, and so taints the fundamental fairness of the appellate proceeding as to constitute a manifest miscarriage of justice.

(3) Whether procedural due process under the Fifth Amendment of the Constitution requires a fraud exception to the basic rule under the Immigration and Nationality Act § 242(b)(4)(A); 8 U.S.C. §

1252(b)(4)(A), that limits appellate review "only on the administrative record on which the order of removal is based," that is analogous to the "plain error standard" in a criminal context.

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IN THE
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Anis Soenaryo, Asnil Amirudin Gadang, Akhdan Gaddang, and Akmal Gadang
Petitioners,

v.

Michael B. Mukasey U.S. Attorney General,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Anis Soenaryo, Asnil Amirudin Gadang, Akhdan Gaddang, and Akmal Gadang respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the order of deportation in their immigration case.

OPINIONS BELOW

The order of the court of appeals (App. 8a-11a) is an unreported decision in civil case no. 06-1256(L) and 06-1763. The opinion of the Board of Immigration Appeals (App. 1a-6a) is an unpublished decision.

JURISDICTION

The court of appeals entered its judgment on April 19, 2007 (App., infra, 12a-13a) and denied petition for panel rehearing on October 10, 2007 (App., 18a-19a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Constitution provides in relevant part "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

Section 242(b)(4)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1252(b)(4)(A) states "[T]he court of appeals shall decided the petition only on the administrative record on which the order of removal is based."

Section 240(b)(4)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1229a(b)(4)(A) states "[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings."

Rule 201 of the Federal Rules of Evidence states in pertinent part;
(b) "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

. . .

(f) "Judicial notice may be taken at any stage of the proceeding."

STATEMENT OF THE CASE

This immigration case presents a compelling and recurring question involving the conflict between two fundamental considerations of appellate jurisprudence, procedural due process under the Fifth Amendment and the statutorily limited scope of appellate review permitted in deportation cases under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), in light of the inherent power of any court, including an appellate court, to take judicial notice of an adjudicative fact pursuant to the Federal Rules of Evidence.

In 1996, Congress passed the IIRIRA, which eliminated the authority of federal district courts to review Board of Immigration Appeals ("BIA") decisions in deportation proceedings. Section 242(a)(2)(D) [1]

[1] "Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review with an appropriate court of appeals in accordance with this section." INA § 242(a)(2)(D); 8 U.S.C. § 1252(a)(2)(D).

of the Immigration and Nationality Act ("INA") limited all judicial review to the circuit court of appeals and only where immigration court proceedings were held. Also under IIRIRA, judicial review by the circuit courts was limited to the record presented below, pursuant to INA § 242(b)(4); 8 U.S.C. § 1252(b)(4). However, this severe limitation has engendered recurring conflict with both the Federal Rules of Evidence and traditional notices of fairness and justice under the Due Process Clause of the Fifth Amendment.

First, a circuit split has developed as a direct result of the congressional dictate limiting appellate review of a deportation case only to the administrative record, pursuant to INA § 242(b)(4)(A). On one side sit both the Second and Ninth Circuits that have explicitly held they can and will look outside the administrative record to adjudicative facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," pursuant to the Federal Rules of Evidence.[2] These two circuit courts have held that in instances where new evidence has arisen, after the administrative record has closed, the circuit courts will admit new adjudicative facts, e.g., changed country conditions.[3] On the other hand, the Third and Fourth Circuits have expressly rejected such an approach as inviting relitigation of immigration-law claims."[4] Petitioners' case is not quite on point with this circuit split as the adjudicative fact that they were seeking to introduce

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[2] Ref. Federal Rules of Evidence, Rule 201(b).

[3] *Lin v. U.S. Dept.*, 473 F.3d 48, 51 (2nd Cir. 2007); *Singh v.Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004).

[4] *Kamara v. Attorney General of U.S.*, 420 F.3d 202, 218 (3rd Cir. 2004); *Stewart v. INS.*, 181 F.3d 587, 595 (4th Cir. 1999).

before the circuit court consisted of evidence of the investigation, indictment, and resulting conviction of the international asylum fraud ring that petitioners were caught up in. This evidence predated the filing of petitioner's motion to reopen their deportation proceeding due to ineffective assistance of counsel with the BIA on March 27, 2006.[5] However, petitioners only became aware of these material and dispositive facts after petitioning the circuit court, when current counsel conducted a due diligence search of prior parties to the instant litigation.

The second and more fundamental issue this deportation case raises is whether the Due Process Clause of the Fifth Amendment compels that significant and material evidence, not presented earlier before the BIA, can and should be considered on appeal, if the denial of such new evidence would constitute a "manifest miscarriage of justice." Additionally, whether there should be a fraud exception to the general rule limiting review to the record below, analogous to the "plain error" standard from the criminal context.

A. Petitioners' Claim For Relief

This is an immigration case, which concerns the denial of petitioners' affirmatively filed asylum application and request for withholding of deportation.

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[5] On November 22, 2004, unbeknownst to petitioners, Paul J. McNuly of the U.S. Department of Justice, Eastern District of Virginia, announced the filing of charges against twenty-six (26) defendants for asylum fraud, labor certification fraud, identification fraud, and conspiracy.

Petitioners, a mother and father and their two sons, fled their country of origin, Indonesia, seeking refugee status in the United States, after being brutally attacked and persecuted on account of their Christian beliefs and the fact the lead petitioner [Mrs. Anis Soenaryo] resembles an ethnic Chinese in her facial features.

Petitioners' asylum and withholding applications were based on the past persecution they received on account of their religious practices and well-founded fear of future persecution at the hands of radical Islamic forces the government of Indonesia is either unable or unwilling to control.

On June 17, 2002, petitioners' filed a timely affirmative asylum application, with the paid assistance of an immigration broker by the name of Megawaty Gandasaputra and her husband Michael Wright. These two individuals operated an immigration service business by the name of Asian American Placement Services in Fairfax Station, Virginia. It was by and through these asylum brokers that petitioners' legal representative was retained for their administrative proceedings. Legal counsel was provided and paid directly by the immigration service business, and not by petitioners. Petitioners' only met twice with their prior Virginia counsel, once at their asylum hearing, and the second time right before their merits hearing in immigration court.

On April 7, 2004, petitioners' claims for asylum and withholding were heard in immigration court. On direct examination of the lead petitioner, her prior Virginia counsel asked a total of twenty (20) questions, none of which had any meaningful relevance to the petitioners' asylum application. Based upon this inadequate offer of proof, the immigration judge denied the petitioners relief,

holding that the lead petitioner did not testify credibly and that they had failed to meet their burden of proof.

On April 30, 2004, petitioners' second counsel, Mr. Roger Kubein, Esq., appealed this decision to the Board of Immigration Appeals. This subsequent direct appeal to the BIA was unsuccessful.

B. Petitioners' Motion to Reopen Based on Ineffective Assistance of Counsel

Petitioners' brought a motion to reopen their deportation matter before the BIA, based upon a violation of their right to competent counsel pursuant to INA § 240(b)(4)(A),[6] alleging that their former Virginia licensed attorney provided ineffective assistance of counsel during their merit hearing before the immigration court by failing to adequately prepare and present their claim for asylum and withholding. The motion to reopen was unopposed by the Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service).

The BIA denied petitioners' motion holding that they failed to establish a prima facie case for relief. However, the BIA did note that prior counsel's performance was inadequate, "Our review of the transcript confirms that the attorney's direct examination was indeed spare." (App. 5a).

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[6] "[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings."

Retained counsel Mr. Kubein, timely appealed this adverse decision by the BIA denying petitioners' motion to reopen, to the Fourth Circuit Court of Appeals. The Fourth Circuit consolidated this petition with the prior filed petition of the direct appeal.

Subsequently, petitioners retained current counsel. It was only after current counsel took on the representation and undertook a due diligence search of the principals in this litigation, that it was discovered the asylum brokers initially hired by the petitioners were the subjects of a multi-departmental, multi-year investigation. This investigation lead by the Department of Justice, ("DOJ") issued a 198-page affidavit culminating in twenty-six (26) defendants being charged with an elaborate asylum fraud scheme. Megawaty Gandasaputra and her husband Michael Wright were two of the ring-leaders in this scam. They are the very same immigration brokers hired initially by petitioners' to assist in their asylum application.

All of this evidence was documented, presented, and fully briefed before the Fourth Circuit for the first time, as the evidence was only recently discovered. In petitioners' supplemental brief, it was alleged that as prior counsel was hired and directly paid by the asylum fraud ring, his representation was presumptively biased, as he was directly conflicted in his duties. Respondent DOJ, who were in fact the very source of the evidence proffered, moved the circuit court to strike the presented evidence of the asylum fraud ring and all arguments associated with that same evidence as being unexhausted.

In their decision of the direct appeal, the court of appeals held that petitioners' failed to show evidence "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992). Alternatively, on the question of the motion to reopen, the circuit court granted the Goverment's motion to strike petitioners' exhibits and as the court characterized, petitioners' unexhausted arguments."

Petitioners' then petitioned the circuit court for a panel rehearing based on the fact that the motion to strike the evidence and arguments were exhausted, as the basis of the motion to reopen was ineffective assistance of counsel, thus this issue was expressly raised. Nor should the evidence be precluded under Rule 201 of the Federal Rules of Evidence, Judicial Notice, and the Duc Process Clause of the Fifth Amendment as a violation of the fundamental fairness of the proceeding. The circuit court denied the petition for panel hearing.

REASONS FOR GRANTING THE PETITION

The circuit court's decision in this case presents a frequently occurring situation where new and material evidence comes to light in a deportation proceeding and the uncertainty and inconsistency with which the circuits handle this newly proffered evidence. As a concomitant consideration here is the question of the proper scope of procedural due process and whether the strict congressional directive to limit judicial review to the administrative record below is violative of due process.

This intersection between express statutory authority, the inherent power of a court to take notice of adjudicative facts, and our traditional notice of fairness and justice has created a conflict within the circuits, who are split on the question of whether to admit evidence outside of the administrative record. The circuit split is implicated in his case as to the whether a circuit court has the inherent authority to hear new evidence for the first-time on appeal.

Alternatively, this case does present a compelling instance where the harsh absolute rule espoused by the circuit court denying petitioners' the opportunity of even presenting evidence of their prior attorney's involvement with the international asylum fraud ring which retained and paid him, denied them their one opportunity to a fair and impartial hearing.

I. The Circuits Are Divided Over Whether to Admit Evidence Outside the Administrative Record For the First Time on Appeal.

The conflict within the circuit courts on how to treat evidence outside of the administrative record is exemplified here by the Fourth Circuit's decision striking petitioner's evidence of the asylum fraud ring raised for the first time on appeal. The circuit court holding in this case is clearly in conflict with several of her sister circuits, specifically the Second and Ninth Circuits that have admitted evidence outside of the administrative record.

The primary authority witthin this circuit issues from *Stewart v. INS*, 181 F. 3d 587, 595 (4th Cir. 1999) which holds, "Because circuit precedent

precludes our consideration of any facts not presented to the BIA for consideration, we cannot consider these arguments," (citing *Farrokhi v. INS*, 900 F.2d 697, 700 (4th Cir. 1990)).

The Second, Sixth, and Ninth Circuits all permit some evidence outside of the record to be noticed for the first time on appeal. The Ninth Circuit stated "It has been suggested that we cannot take notice of the RAW's existence and operation because we are limited in our review to the administrative record upon which the deportation order is based and the Attorney General's findings of fact. But it is nonsense to suppose that we are so cabined and confined that we cannot exercise the ordinary power of any court to take notice of facts that are beyond dispute." *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004) (internal citation omitted). The Second Circuit's authority on this point is also unequivocal, "Yet notwithstanding the statutory injunction to 'decide the petition [for review] only on the administrative record on which the order of removal is based,' we have previously taken judicial notice of facts outside the record, particularly regarding country conditions." *Lin v. U.S. Dept.*, 473 F.3d 48, 51 (2nd Cir. 2007).

Federal Rules of Evidence, Rule 201 permits a court to take notice of any "adjudicative" fact "not subject to reasonable dispute in that it is either (1) generally know within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." The fact of a Department of Justice investigation and prosecution, published by respondent itself clearly falls within the second requirement of being capable of accurate and ready determination.

Evidence that would show petitioners' prior counsel was in league, hired, and paid directly by an indicted and convicted criminal asylum fraud ring could reasonably fall within the definition of an adjudicative fact and therefore fall within the purview of FRE Rule 201.

The Ninth Circuit's decision in *Singh v. Ashcroft*, 393 F.3d at 905 explained, "The statutory authorization [of judicial notice under FRE 201], already broad, has been interpreted even more extensively in the context of appellate review of an agency." This circuit holds that "[t]he language of the statute speaking of the administrative record must be interpreted in the context of the Federal Rules of Evidence, the general practice of administrative review . . . and the common practice of the courts." Id.

The appellate court's favorable ruling on respondent's motion to strike was fatal to petitioners' argument that they received ineffective assistance of counsel by their former attorney because he was hired by, paid by, and loyal to the international asylum fraud ring in direct conflict with petitioners' interests. By refusing to accept, or even consider all the evidence of this connection between petitioners' prior counsel and the convicted asylum fraud ring and explicit conflict of interest created thereby, petitioners were left without any significant proof of their argument and deprived of due process under the law.

"[A] court may take judicial notice of facts without prior notification to the parties, so long as the court subsequently provides an opportunity to rebut the noticed facts...." *Gafoor v. INS*, 231 F.3d 645, 657 (9th Cir. 2000); *quoting Gomez-Vigil v. INS*, 990 F.2d 1111, 1115 (9th Cir.1993) (Aldisert, J., concurring).

Furthermore, in *Singh v. Ashcroft*, 393 F.3d at 906, the Ninth Circuit held, "Under the heading Judicial Notice is Expanded in Administrative Proceedings, the magisterial textbook of Judge Jack B. Weinstein[7] states:

> When a court reviews an administrative determination to find if it is adequately supported by the record, the court should use the scope of administrative notice authorized, rather than its own more narrowly subscribed notice. The court should place itself in the same position as the administrative board.

Judicial notice of law, legislative facts, or factual matters is proper where there is no dispute as to the authenticity of those matters. *See Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1086 (2nd Cir. 1982); *see also Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503 (10th Cir. 1997).

Judicial notice has been taken by this Court in numerous instances, such as "[T]he court relied on Circuit precedent condemning similar practices and the results of a United States Department of Justice (DOJ) report that found Alabama's systematic use of the hitching post to be improper corporal punishment." [fn7] The DOJ report apparently was not before the District Court in this case, but the Court of Appeals took judicial notice of the report and referenced it throughout the decision below." *Hope v. Pelzer*, 536 U.S. 730, 737, fn. 7 (2002), (on Certiorari from the 11th Circuit). Additionally, this Court took judicial notice of facts involving a California Water Project. "The Government has asked us to take

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[7] Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 201.02[4] (2d ed. 2004) (footnotes omitted).

judicial notice of certain basic facts about the Friant Division of the Central Valley Project and about the waters flowing through that division and, more particularly, through the Madera Canal. Although petitioner will have an opportunity to challenge those details on remand, we accept them for purposes of this opinion." *Central Green Co. v. United States*, 531 U.S. 425, 434 (2001).

Therefore, as FRE Rule 201(f) does not distinguish between taking judicial notice on appeal and appellate review of the trial court's judicial notice, there is wide latitude of discretion that has led directly to a conflict and divergence of authorities among the circuit courts on this question. Without resolution on this schism by this Court, the lower courts will continue to disagree and in the realm of administrative agency review in the deportation context, and continue to move in polar opposites of each other on the question of whether to admit evidence outside of the administrative record presented below.

II. Due Process and Fundamental Fairness Requires That An Exception Exists for Admittance of New Evidence to Prevent a "Manifest Miscarriage of Justice."

Wholly apart from the circuit split discussed above is the issue of whether the Due Process Clause of the Fifth Amendment requires and exception to the statutory provision of the INA limiting review to only the facts in the administrative record. See INA § 242(b)(4)(A). In the Wright and Graham treaties, *Federal Practice and Procedure: Evidence*, 2d Ed., page 302, note 20, the authors state, "while judicial notice may be taken on appeal when it was not taken in the

trial court, this should not be does to relieve parties of duty to put on evidence except in extreme cases in which the failure to take judicial notice would be akin to plain error." (Emphasis added).

The authors also cite to Washington State rule where "the appellate courts have held that Rule 201(f) trumps the appellate rule that limits courts to facts that appear in the record on appeal."[8]

This Court has held that in a criminal context, "[w]hen a defendant raises an issue on appeal that was not raised before the district court, the court of appeals may review only for plain error." *United States v. Olano*, 507 U.S. 725, 730 (1993). "Plain error is invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process." *Olano*, 507 U.S. at 736 (1993).

"It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence her is lawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Here petitioners were victims of a sophisticated international asylum fraud ring that lured them out to Virginia in order to pursue their asylum claim. Petitioners were duped; they were desperately looking for help in pursuing their asylum claim because of their fear of returning to Indonesia. Fraud was at the heart of this crime ring.

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[8] Tegland, Washington Practice: Evidence, 4th ed. 1999, pp. 150-51.

The Virginia State Bar is currently investigating petitioners' prior ineffective counsel. Petitioners have been asked if they are willing to come forward and provide information and possibly testimony in this investigation and they have agreed.

In the immigration-deportation context, there is no "plain error" exception that would permit a circuit court to admit the evidence of this international crime fraud ring, only discovered after the close of the administrative proceeding. This denial violates the fundamental fairness on procedural due process and would constitute a manifest miscarriage of justice, if left uncorrected by this Court.

In sum, this case is a perfect example of a factual situation that cries out for an exception to the general statutory exhortation under INA § 240(b)(4)(A), to only examine the administrative record below, as petitioners were fraudulently deceived by an international asylum fraud ring and then not permitted to present any evidence of this fact in their deportation proceeding, violating their due process rights under the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2007

APPENDIX

U.S. Department of Justice

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Executive Office for Immigration Review

Board of Immigration Appeals

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Name: SOENARYO, ANIS A95-905-265
Riders: 95-205-266, 95-905-267, 95-205-268

Date of this notice: 06/08/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
s/
Frank Krider
Chief Clerk

Enclosure

Panel Members:
O'Leary, Brian M.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A95 905 265 – Arlington
A95 905 266
A95 905 267
A95 905 268

Date: June 8, 2006

In re: ANIS SOENARYO
ASNIL AMIRUDIN GADANG
AKHDAN GADANG
AKMAL GADANG

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Roger S. Kuebin, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C.§ 1227(a)(1)(B)]-
In the United States in violation of law (all respondents)

APPLICATION: Reopening

This matter was last before the Board on December 27, 2005, when we affirmed the Immigration Judge's decision denying the respondents' application for asylum, withholding of removal, and protection under the Convention Against Torture. On March 27, 2006, the respondents filed a timely motion to reopen alleging ineffective assistance of counsel. The Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service) has not responded to the motion. The motion will be denied.

Initially, we find that the respondents, natives and citizens of Indonesia, have substantially complied with the requirements relating to motions to reopen based on ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 37 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). See *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006). The lead respondent submitted a short affidavit discussing her agreement with former counsel and the ways in which she believes he failed to provide effective representation during her removal hearing. The respondents also filed a complaint with the Maryland State Bar Association and sent notification to their former attorney.

Nevertheless, we do not find that the respondents have demonstrated that their application for relief was prejudiced by the actions or inaction of their former counsel. See *Matter of Assaad*, 231 I&N Dec. 553 (BIA 2003); *Figeroa v. INS*, 886 F.2d 76 (4th Cir. 1989((requiring an alien to demonstrate not only ineffective assistance but also prejudice that occurred as a result). The lead respondent states in her affidavit that her attorney "failed to ask me any meaningful questions about my case," "failed to help me explain to the judge any apparent discrepancies in my case," and "failed to properly prepare me for my hearing." She also suggests in her motion that her attorney's direct examination

did not elicit the details that are present in her written statement regarding three alleged incidents of violence against her and/or her family members in April 1998, May 1998, and May 2001. Our review of the transcript confirms that the attorney's direct examination was indeed spare. However, in answering counsel's few questions, the respondent provided testimony that was materially inconsistent with her written statement (I.J. at 4; Tr. at 11; Exh. 2A). Moreover, even accepting the respondent's testimony as credible, the Immigration Judge correctly concluded that she failed to establish that she was subjected to violence on account of her Christian faith (I.J. at 13-14). The incidents of mob violence to which the respondent testified – particularly the alleged attack on May 15, 1998, an infamous day of widespread rioting in Indonesia – are representative of the generalized civil unrest in that country during the time in question. See M.A. v. INS, 899 F.2d 304, 314-5 (4th Cir. 1990) (observing that "courts have consistently rejected applications for political asylum based on fear grounded in general violence or unrest in one's native country"). The respondent was unable to identify the attackers, stating only that "my imagination told me that they are Muslim because at the time, a lot of Muslim confronted, un, other people" (Tr. at 12-13). Additionally, the respondent and her family did not suffer serious injuries during any of these incidents that would rise to the level of persecution. We conclude that the respondents have failed to establish that their case was prejudiced by the ineffective assistance of counsel. Accordingly, we will enter the following order.

ORDER: The motion to reopen is denied.

s/
FOR THE BOARD

FILED: January 4, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1256(L)
(A95-905-265)
(A95-905-266)
(A95-905-267)
(A95-905-268)

ANIS SOENARYO; ASNIL AMIRUDIN GADANG;
AKHDAN GADANG; AKMAL GADANG
Petitioners

versus

ALBERTO R. GONZALES, Attorney General
Respondent

ORDER

Respondent has filed a motion to strike exhibits 1-10 of petitioners' supplemental appendix and new arguments in petitioners' supplemental brief. Petitioners have filed a response in opposition to the motion.

The Court defers consideration of the emotion pending assignment of this case to a panel for review along with the merits of the case.

For the Court – By Direction

/s/ Patricia S. Connor
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1256

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKHDAN GADANG; AKMAL GADANG

Petitioners

v.

ALBERTO R. GONZALES, Attorney General

Respondent

No. 06-1763

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKHDAN GADANG; AKMAL GADANG

Petitioners

v.

ALBERTO R. GONZALES, Attorney General

Respondent

On Petitions for Review of an Order of the Board of Immigration Appeals. (A95-905-265; A95-905-266; A95-905-267; A95-905-268)

Submitted: March 28, 2007 Decided: April 19, 2007

Before WILLIAMS, KING, and DUNCAN, Circuit Judges.

Petitions denied by unpublished per curiam opinion.

Haitham Edward Ballout, LAW OFFICES OF HAITHAM EDWARD BALLOUT, Burlingame, California for Petitioners. Peter D. Keisler, Assitant Attorney General, Barbara C. Biddle, Sushma Soni. DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Anis Soenaryo, and dependant petitioners Asnil Amirudin Gadang, Akhdan Gadang, and Akmal Gadang, all natives and citizens of Indonesia, petition for review of (1) an order of the Board of Immigration Appeals (Board) adopting and affirming the Immigration Judge's denial of Soenaryo's applications for asylum, withholding of removal, and protection under the Convention Against Torture, and (2) the Board's order denying her subsequent motion to reopen.

To obtain reversal of a determination denying eligibility for relief, an alien "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992). We have reviewed the evidence of record and conclude that Soenaryo fails to show that the evidence compels a contrary result. Having failed to qualify for asylum, Soenaryo cannot meet the higher standard to qualify for withholding of removal. Chen v. INS, 195 F.3d 198, 205 (4th Cir. 1999); INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987). Further, she failed to demonstrate eligibility for protection under the Convention Against Torture. See 8 C.F.R. § 1208.16(c)(2) (2006).

In addition, out review discloses no abuse of discretion in the Board's denial of Soenaryo's motion to reopen. See INS v. Doherty, 502 U.S. 314, 323-24 (1992); Rusu v. INS, 296 F.3d 316, 324 (4th Cir. 2002); Matter of Lozada, 19 I. & N. Dec. 637, 640 (BIA 1988). We grant the Attorney General's motion to strike the unexhausted arguments and exhibits one through ten of Soenaryo's supplemental brief. We deny the

petitions for review and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITIONS DENIED

JUDGMENT

FILED: April 19, 2007

UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 06-1256
(A95-905-265)
(A95-905-266)
(A95-905-267)
(A95-905-268)

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKHDAN GADANG; AKMAL GADANG

Petitioners

v.

ALBERTO R. GONZALES, Attorney General

Respondent

No. 06-1763
(A95-905-265)
(A95-905-266)
(A95-905-267)
(A95-905-268)

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKHDAN GADANG; AKMAL GADANG

Petitioners

v.

ALBERTO R. GONZALES, Attorney General

Respondent

On Petitions for Review of an Order of the Board of Immigration Appeals

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In accordance with the written opinion of this Court filed this day, the Court denies the petitions for review of the orders of the Board of Immigration Appeals.

A certified copy of this judgment will be provided to the Agency upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 11, 2007

No. 06-1256
A95-905-265
A95-905-266
A95-905-267
A95-905-268

ANIS SOENARYO; ASNIL AMIRUDIN GADANG;
AKHDAN GADANG; AKMAL GADANG
Petitioners

v.

ALBERTO R. GONZALES, Attorney General
Respondent

No. 06-1763
A95-905-265
A95-905-265
A95-905-267
A95-905-268

ANIS SOENARYO; ASNIL AMIRUDIN GADANG;
AKMAL GADANG
Petitioners

v.

ALBERTO R. GONZALES, Attorney General
Respondent

MANDATE

The judgment of this Court, entered 4/19/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the agency and constitute the mandate of this Court.

/s/ Patricia S. Connor
Clerk

FILED: August 22, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1256(L)
(A95-905-265)
(A95-905-266)
(A95-905-267)
(A95-905-268)

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKHDAN GADANG; AKMAL GADANG

Petitioners

versus

ALBERTO R. GONZALES, Attorney General

Respondent

ORDER

Petitioners have filed a motion to recall the mandate and reinstate the stay of deportation and voluntary departure. Respondent has filed a response indicating no objection to recall of the mandate and reinstating the stay of deportation, but objecting to the motion for stay of voluntary departure. Petitioners have also filed an unopposed motion to file late motion for panel rehearing, with accompanying petition for rehearing, which the Court construes as a motion for extension of time to file petition for rehearing.

The Court grants the motion to recall the mandate, extends the time for filing of a petition for

rehearing as timely filed. By order dated March 30, 2006, the Court granted petitioners' motion for stay of deportation, but denied the motion for stay of voluntary departure. The stay of deportation previously ordered is automatically reinstated given recall of the mandate and shall remain in effect pending issuance of the mandate.

For the Court – By Direction

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 10, 2007

No. 06-1256
A95-905-265
A95-905-266
A95-905-267
A95-905-268

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKHDAN GADANG; AKMAL GADANG
Petitioners

v.

PETER D. KEISLER, Acting Attorney General
Respondents

No. 06-1763
A95-905-265
A95-905-265
A95-905-267
A95-905-268

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKMAL GADANG
Petitioners

v.

PETER D. KEISLER, Acting Attorney General
Respondent

ORDER

Petitioners have filed a petition for rehearing.
The court denies the petition for rehearing.
Entered for a panel composed of Chief Judge Williams, Judge King, and Judge Duncan.

For the Court

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 18, 2007

No. 06-1256
A95-905-265
A95-905-266
A95-905-267
A95-905-268

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKHDAN GADANG; AKMAL GADANG
Petitioners

v.

PETER D. KEISLER, Acting Attorney General
Respondent

No. 06-1763
A95-905-265
A95-905-265
A95-905-267
A95-905-268

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKMAL GADANG
Petitioners

v.

PETER D. KEISLER, Acting Attorney General
Respondent

MANDATE

The judgment of this Court, entered 4/19/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the agency and constitute the mandate of this Court.

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 23, 2007

No. 06-1256
A95-905-265
A95-905-266
A95-905-267
A95-905-268

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKHDAN GADANG; AKMAL GADANG
Petitioners

v.

PETER D. KEISLER, Acting Attorney General
Respondent

No. 06-1763
A95-905-265
A95-905-265
A95-905-267
A95-905-268

ANIS SOENARYO; ASNIL AMIRUDIN GADANG; AKMAL GADANG
Petitioners

v.

PETER D. KEISLER, Acting Attorney General
Respondent

ORDER

Petitioners filed a motion to recall the mandate and to stay the mandate pending application to the United States Supreme Court for a writ of Certiorari.

The court denies the motion.

For the Court – By Direction

/s/ Patricia S. Connor
Clerk

United States Constitution, Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Evidence, Rule 201 Judicial Notice of Adjudicative Facts provides:

(a) Scope of rule.
This rule governs only judicial notice of adjudicative facts.
(b) Kinds of facts.
A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
(c) When discretionary.
A court may take judicial notice, whether requested or not.
(d) When mandatory.
A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.
A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
(f) Time of taking notice.
Judicial notice may be taken at any stage of the proceeding.
(g) Instructing jury.
In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Section 240(b)(4) of the Immigration and Nationality Act; 8 U.S.C. §1229a(b)(4) provides:

(4) Alien's rights in proceeding
In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,
(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

Section 242(b)(4) of the Immigration and Nationality Act: 8 U.S.C. § 1252(b)(4) provides:

(4) Scope and standard for review
Except as provided in paragraph (5)(B)—

> **(A)** the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,
> **(B)** the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,
> **(C)** a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and
> **(D)** the Attorney General's discretionary judgment whether to grant relief under section 1158 (a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158 (b)(1)(B), 1229a (c)(4)(B), or 1231 (b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.